Lihli Fashions Corporation and King Kuo International Enterprises, Inc., and their alter egos, Lihli of New York, Inc. and Liyan International Inc. *and* International Ladies' Garment Workers' Union, Local 89-22-1, AFL–CIO. Case 29–CA–17681

April 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On December 23, 1994, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that Liyan International/Lihli of New York is the alter ego of Lihli Fashions/King Kuo. The record contains substantial evidence that the companies shared substantially identical ownership, management, employee complement, supervision, customers, and business purpose. That evidence is sufficient to show the alter ego status of these companies, even without evidence of antiunion animus, i.e., that one entity was set up to evade the union obligations of the other.[1] Nonetheless, evidence of motivation to avoid such obligations is relevant to an alter ego finding.[2]

Beginning in August 1992, Lihli Fashions/King Kuo breached its collective-bargaining agreement with the Union by failing to pay unit employees the contractually mandated pay raise, and in December 1992, it ceased making contractually required payments to the Union's health and welfare fund. Union representative Linda Mars testified[3] that in late February 1993, before Lihli Fashions/King Kuo allegedly went out of business in late April, she was denied contractually mandated access to the Respondents' facility and told, ''this is not a union shop no more.'' Subsequently, after the establishment of Lihli of New York and Liyan International, owner Lihli Hsu denied Mar's telephone request to see the unit employees, stating, ''[W]hy are you still hunting around us . . . this shop is no longer a union shop, no more.'' Finally on October 26, 1993, the Respondents again denied the Union's written request for access to the unit employees. These attempts by the Respondents to evade their statutory responsibilities, provide additional support for the judge's 8(a)(1) and (5) findings.

[1] *NLRB v. Hospital San Rafael*, 42 F.3d 45, 50–51 (1st Cir. 1994); *E.G. Sprinkler Corp.*, 268 NLRB 1241, 1243–1244 (1984), enfd. sub nom. *Goodman Piping Products v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984).

[2] Ibid.

[3] Contrary to the Respondents' contentions, Mars' testimony was uncontroverted.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lihli Fashions Corporation and King Kuo International Enterprises, Inc., and their alter egos, Lihli of New York, Inc. and Liyan International Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Haydee Rosario, Esq. and *James Kearns, Esq.*, for the General Counsel.

Robert A. Schutzman, Esq., for the Respondents.

Everett Lewis, Esq. and *Lauren Esposito, Esq. (Lewis, Greenwald, Kennedy, Clifton & Schwartz, P.C.)*, for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on September 20 and October 18, 1994. The charge was filed on September 30, 1993, and was personally served on the Respondents on or about October 28, 1993. The first amended charge was filed on December 21, 1993, and served by certified mail on or about December 22, 1993. The complaint was issued on December 27, 1993, and amended on September 21, 1994. As amended, the complaint alleged:

1. That Lihli Fashions Corporation and King Kuo International Enterprises were New York corporations that did business until late April 1993, out of 36–32 34th Street, Long Island City, New York, and were engaged in the manufacture of silk dresses, blouses, suits, and other ladies apparel. It is contended that these two corporations constituted a single employer within the meaning of the National Labor Relations Act.

2. That Lihli Fashions/King Kuo had recognized the Union as the bargaining representative of its production, maintenance, and packing and shipping employees and that said corporations (as a single employer) had entered into successive collective-bargaining agreements with the Union, the last being effective from August 1, 1991, to July 31, 1994.

3. That in late April 1993, on a date presently unknown, Lihli of New York Inc. and Liyan International Inc. commenced operations at the same location described above.

4. That the two new entities, Lihli of New York and Liyan International, are a single employer.

5. That Lihli of New York/Liyan International are the alter egos of Lihli Fashions/King Kuo.

6. That as an alter ego, Lihli of New York/Liyan is an employer which was bound by the terms of the aforesaid collective-bargaining agreement.

7. That the Respondents have failed to provide a 35-cent-per-hour wage increase that was due to its employees on August 1, 1993.

8. That since late April 1993, the Respondents have failed to make payments to the welfare fund and the pension fund as required by the contract.

9. That since late April 1993, the Respondents have refused to grant access to the Union's representatives as required by the collective-bargaining agreement.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the General Counsel's statement in support of its position and the briefs filed by the General Counsel and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents, all of which are New York corporations, are engaged in the business of designing and manufacturing women's garments. The Respondents admit and I find that each of them have purchased goods and materials valued in excess of $50,000 which were shipped to them from outside the State of New York. I therefore conclude that the Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Lihli Fashions and King Kuo were two New York corporations engaged in the manufacture of designer women's clothes. (They have since been dissolved.) They were located at 36–32 34th Street, Long Island City in a building owned by the Hsu family. It was conceded that both corporations were operated as a single employer, albeit if any distinction must be made, Lihli Fashions made knitted garments and King Kuo created garments which generally were made of silk. In both cases, these companies made garments for a designer named Adolpho and they were sold through Adolpho to the high-end departments of such stores as Saks Fifth Avenue and Neiman Marcus.

There is no question but that Lih Yuh Kuo who is also known as Lihli Hsu was the president and the chief operating officer of Lihli Fashions and King Kuo. Lihli Hsu testified that she and her children owned the stock whereas her children asserted that to their knowledge, they did not have any shares. The Respondents were unable to locate the stock certificates for the two companies and therefore the ownership of Lihli Fashions and King Kuo is in doubt.

Subject to the control of Lihli Hsu, the principle supervisors of Lihli Fashions/King Kuo were Kim-mi, Yvonne Wang, and Sue Fue Kuo. In addition, after their graduations from college, Lihli Hsu's three children, Henry, Ruth, and Karen Hsu, were engaged to perform certain services for the companies.

For a number of years, Lihli Fashions/King Kuo had maintained a collective-bargaining relationship with the Union. The most recent contract was for the period from August 1, 1991, to July 31, 1994. (It is noted that the contract between the Union and Lihli Fashions/King Kuo incorporated by reference the terms of a collective-bargaining agreement between the Apparel Manufacturers, Association Inc., the Affiliated Dress Manufacturers, Inc., and the Dressmakers' Joint Council.) Among other things, the contract required the company to (a) make contributions to jointly administered pension and welfare funds, (b) grant certain wage and cost of living increases to employees, and (c) grant access to union representative to its premises.

Beginning in August 1992, Lihli Fashions/King Kuo started to breach certain provisions of the collective-bargaining agreement. The company failed to grant to its employees a 35-cent-per-hour wage increase that was due on August 1, 1992, and it failed to make contractually required payments to the pension and welfare funds after December 1, 1992. In response, the Union commenced arbitration proceedings against the Company and obtained awards in each instance.

Sometime in early 1993, Adolpho announced that he was retiring and did so in May 1993. Initially, the Hsu family attempted to get a license from Adolpho to produce garments under his name, but this was refused. Accordingly, a decision was made to directly market garments designed by Lihli Hsu under the Lihli name.

The record indicates that in the spring of 1993, the Hsu family approached the buyer from Saks Fifth Avenue and convinced that company to carry the Lihli garments in its designer department, albeit at prices that were somewhat lower than when similar garments made by Lihli Fashions/King Kuo were sold by Adolpho. At about the same time, two new corporations were formed, Liyan International and Lihli of New York, each of these being owned equally by Lihli Hsu and her three children. Simultaneously, steps were taken to dissolve the two former corporations, namely, Lihli Fashions and King Kuo.

Lihli of New York and Liyan International are separate New York corporations but with common ownership. Lihli of New York operates out of a showroom located on 57th Street in Manhattan, New York. Karen Hsu spends most of her time out of this location where she is responsible for showing the line to customers. Liyan International is located in Long Island City at the same building that the two former corporations were located. Liyan manufactures exclusively for Lihli Inc., and all of its manufacturing operations are conducted at this location. (Lihli only sells garments manufactured by Liyan.) Henry Hsu and Ruth Hsu spend most of their time at the Long Island City location. Lihli Hsu splits her time between both locations.

With the acquisition of the Saks Fifth Avenue account, the Company commenced to design, sell, and manufacture knitted and silk garments under its own label. After a period during the winter of 1992–1993 when many employees were laid off by Lihli Fashions/King Kuo, the new company recalled many of the old employees as these were the people who had the necessary skills to make the custom-made clothes that were being sold. After acquiring the account of Saks Fifth Avenue, the new companies were able to obtain many of the former customers, such as Neiman Marcus, who had previously purchased the garments under the Adolpho label.

Notwithstanding the dissolution of the two old corporations and the creation of the two new corporations, the evi-

dence shows that there really has been little change in the operations of the companies. Their customer base of the new corporations is essentially the same as the old corporations, as are the vendors with whom they do business. The supervisors are the same and most of the employees of the two new corporations had previously been employed in identical jobs by the two old corporations. The manufacturing operations are the same, using the same type of equipment at the same location. The types of garments sold are essentially the same as when they were marketed under the Adolpho label. The old corporations were controlled by Lihli Hsu and she still has the last word in any decision affecting the two new corporations. She designs the clothes manufactured by Liyan and sold by Lihli of New York and she supervises the production of these clothes. She does this because she is, at present, the person with the most skill, expertise, and artistic talent. There may come a time when one or more of her children will take over some or all of these functions, but that time has not yet arrived.

On April 2, 1993, the Company wrote to the Union as follows:

> We are writing to notify you that we will be going out of our business. Please note that all agreements will be terminated.

Accordingly, as of April 2, 1993, neither the old corporations nor the new corporations have adhered to the terms of the collective-bargaining agreement and did not make payments to the funds as required by the contract. Also, when on October 26, 1993, the Union requested access to the employer's premises to talk to employees, this request was denied.

III. ANALYSIS

The crucial issue in this case is whether Liyan International/Lihli of New York constitutes an alter ego of Lihli Fashions/King Kuo. If the new entity, which I find constitutes a single employer,[1] is an alter ego of the old, then the new Company is bound to recognize and bargain with the Union as the representative of its employees in an appropriate unit.

Moreover, if is concluded that it is an alter ego, then the new entity would be bound to honor the existing contract and also would be bound, in the absence of good-faith bargaining, to continue the terms and conditions set forth in that contract even after its expiration (July 30, 1994). Under the National Labor Relations Act, an employer may not unilaterally change the terms of employment as set out by the terms of a collective-bargaining agreement, even after the contract expires. The employer is required to maintain the contract's terms and conditions, including payments to benefit funds, (but not the checkoff of union dues), until a new agreement is reached which modifies or terminates such obligations; or until after an impasse is reached whereupon a company may unilaterally implement some or all of its last contract offer; or until the employer is legally discharged from its obligation to recognize and bargain with the Union. *W. A. Krueger Co*., 299 NLRB 914, 915 (1990); *Roman Iron Works*, 292 NLRB 1292, 1293 (1989). See also *Control Services*, 303 NLRB 481, 482, 493 (1991), where the Board held, inter alia, that the employer's unilateral change in the terms and conditions of employment (including its refusal to grant access as required by the expired contract), constituted a violation of Section 8(a)(5) of the Act, in the absence of a valid impasse in negotiations.

In *Advance Electric*, 268 NLRB 1001, 1002 (1984), the Board stated that the test for determining alter ego status was:

> > The legal principles to be applied in determining whether two factually separate employers are in fact alter egos are well settled. Although each case must turn on its own facts, we generally have found alter ego status where the two enterprises have ''substantially identical'' management, business purpose, operation, equipment, customers, and supervision as well as ownership.
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> *Denzil S. Alkire*, 259 NLRB 1323, 1324 (1982). Accord: *NLRB v. Campbell-Harris Electric*, 719 F.2d 292 (8th Cir. 1983). Other factors which must be considered in determining whether an alter ego status is present in a given case include ''whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead its purpose was to evade responsibilities under the Act.'' *Fugazy Continental Corp*., 265 NLRB 1301 (1982). [Footnote omitted.]

In *MIS, Inc*., 289 NLRB 491 (1988), the Board, citing *Advance Electric* stated that: ''No one factor is determinative of alter ego status, and not all of these indicia need be present to find that an alter ego relationship exists.'' See also *RCR Sportswear*, 312 NLRB 513 (1994).

In the present case there is substantial commonality of ownership and control over the old and new corporations. (De facto, Lihli Hsu is in ultimate control.) They are engaged in similar businesses with substantially the same customers, except that the new corporations now are responsible for marketing Lihli Hsu's designs instead of having them marketed through Adolpho. The supervisory and employee complement of the old and new companies are substantially the same and the clothes are manufactured at the same facility using the same methods and means. I therefore conclude that Liyan International/Lihli of New York is the alter ego of Lihli Fashions/King Kuo.

CONCLUSIONS OF LAW

1. By refusing to recognize and bargain with the Union, Lihli of New York and Liyan International have violated Section 8(a)(1) and (5) of the Act.

2. By refusing to honor the terms and conditions of the collective-bargaining agreement between Lihli Fashions Inc., and King Kuo and the Union, the Respondents have violated Section 8(a)(1) and (5) of the Act.

3. By failing to provide a 35-cent-per-hour wage increase that was due to its employees on August 1, 1993, the Respondents violated Section 8(a)(1) and (5) of the Act.

4. By failing to make payments to the welfare fund and the pension fund since late April 1993 as required by the contract, the Respondents have violated Section 8(a)(1) and (5) of the Act.

[1] See *Central Management Co.*, 314 NLRB 763 (1994).

5. By refusing to grant access to the Union's representatives as required by the collective-bargaining agreement, the Respondents have violated Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 8a(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As the employees speak several languages, it is recommended that the notice be in English, Spanish, and Mandarin.

I shall recommend that the Respondents make the pension and welfare funds whole for any contributions that they were required to make under the terms of the collective-bargaining agreement. I shall also recommend that the Respondents reimburse any employee (or their families), who having suffered an illness or injury, incurred expenses to the extent that such expenses were not reimbursed by the welfare fund but would have been reimbursed if payments had been made to the fund.

In the case of payments to the funds, it is recommended that such payments be made with interest to be computed in accordance with the practice set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondents, Lihli Fashions Corporations Inc., King Kuo International Enterprises Inc., Lihli of New York Inc., and Liyan International Inc., their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union.

(b) Refusing to honor the terms and conditions of the collective-bargaining agreement with the Union that ran from August 1, 1991, to July 30, 1994.

(c) Failing to provide a 35-cent-per-hour wage increase that was due to employees on August 1, 1993, as required by the terms and conditions of the aforesaid collective-bargaining agreement.

(d) Failing to make payments to the welfare fund and the pension fund as required by the terms and conditions of the aforesaid collective-bargaining agreement.

(e) Refusing to grant access to the Union's representatives as required by the terms and conditions of the aforesaid collective-bargaining agreement.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production, maintenance, packing and shipping employees excluding pattern makers, guards and supervisors, as defined in the Act.

(b) Pay into the Union's pension and welfare funds on behalf of its unit employees, those contributions it failed to make from late April 1993, in the manner set forth in the remedy section of this decision.

(c) Make whole any employees for any losses suffered by reason of its unlawful failure to pay the wage increase due on August 1, 1993, and by reason of its discontinuance of payments to the Union's welfare funds in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order.

(e) Post at its facilities in Long Island City, New York and Manhattan, New York copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with International Ladies' Garment Workers Union, Local 89-22-1, AFL–CIO.

WE WILL NOT refuse to honor the terms and conditions of our collective-bargaining agreement with the Union that ran from August 1, 1991, to July 30, 1994.

WE WILL NOT fail to provide the 35-cent-per-hour wage increase that was due to our employees on August 1, 1993, as required by the terms and conditions of the aforesaid collective-bargaining agreement.

WE WILL NOT fail to make payments to the Union's welfare and pension fund as required by the terms and conditions of the aforesaid collective-bargaining agreement.

WE WILL NOT refuse to grant access to our premises to the Union's representatives as required by the terms and conditions of the aforesaid collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain with the Union on request, as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production, maintenance, packing and shipping employees excluding pattern makers, guards and supervisors, as defined in the Act.

WE WILL pay into the Union's pension and welfare funds those contributions we failed to make from late April 1993.

WE WILL make whole any employees for any losses in earnings and/or benefits suffered by reason of our unlawful failure to pay the wage increase due on August 1, 1993, and by reason of our discontinuance of payments to the Union's welfare funds.

LIHLI FASHIONS CORPORATION, KING KUO INC., LIHLI OF NEW YORK INC., AND LIYAN INTERNATIONAL INC.